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In the Supreme Court of the United States

JANIE COCKRELL, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
INSTITUTIONAL DIVISION,
Petitioner,

v.

CALVIN JEROLD BURDINE,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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87 pp

This is a capital case.

QUESTIONS PRESENTED

i.

Should prejudice be presumed when defense counsel intermittently "dozed and actually fell asleep" during portions of trial?

ii.

If prejudice must be presumed under such circumstances, may that rule be retroactively applied on habeas review under *Teague v. Lane*, 489 U.S. 288 (1989)?

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PETITION FOR WRIT OF CERTIORARI

In *Burdine*, the en banc Fifth Circuit decided that a criminal defendant is automatically entitled to a new trial because of lapses in his attorney's trial performance caused by unspecified episodes of dozing or sleeping—regardless of the nature, length, or timing of those lapses, regardless of the evidence of guilt, and regardless of any showing that counsel's lapses undermined the outcome. That decision alters this Court's framework for analyzing deficient attorney performance and invites certiorari review for three reasons. First, *Burdine* creates a test for weighing the seriousness of counsel's sleeping that conflicts with tests from the Second and Ninth Circuits. Second, it treats temporary absences of defense counsel from trial as automatically reversible, in conflict with other federal and state courts. Third, it earmarks one kind of attorney-impairment for a presumption of prejudice, while other federal courts have analyzed similar impairments under the traditional prejudice test. The Court should grant this petition to resolve these important constitutional questions.

CITATION OF UNITED STATES COURT OF APPEALS'S OPINION

Calvin Jerold Burdine v. Gary L. Johnson, __ F.3d __, 2001 WL 914267 (CA5 Aug. 13, 2001) (en banc) (Pet. App. 1a–133a)

BASIS FOR JURISDICTION

The Fifth Circuit delivered its judgment and opinion in *Burdine* on August 13, 2001. The Court has jurisdiction to entertain the Director's petition for writ of certiorari under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISION INVOLVED

> "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."

U.S. CONST. amend VI.

STATEMENT OF THE CASE

On April 20, 1983, the body of W.T. Wise was found in his trailer in Houston, Texas. Wise's hands and legs were bound with electrical cord, and his mouth was gagged with socks and a sheet. His scalp was lacerated, but he had died of two stab wounds to the back, one hard enough to break a rib. Later that month, Calvin Jerold Burdine, Wise's former lover, was arrested in California with his accomplice, Douglas McCreight. In fleeing from Houston to California, the men had pawned several items stolen from Wise's trailer, used his bank cards to obtain cash, and were finally arrested when they pawned Wise's gun for thirty dollars. Two Houston detectives were soon summoned to California, where they interviewed Burdine and McCreight separately. After being Mirandized twice, Burdine confessed to robbing and murdering Wise. *See generally Burdine v. State*, 719 S.W.2d 309, 312-14 (Tex. Crim. App. 1986); 13SR248-52.

According to his confession,[1] Burdine and Wise had lived together for several months in Wise's trailer in 1982, but, after quarreling over money and whether Burdine would prostitute himself for Wise, Burdine had moved out. After Burdine met

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1. At trial, Burdine argued that his confession was illegally obtained, but the judge determined after a bench hearing that it was admissible. 12SR140-86; 13SR190-203; 14SR405-12. The Texas Court of Criminal Appeals affirmed that decision on direct review. *See Burdine*, 719 S.W.2d, at 317-18.

McCreight in 1983, the men decided to rob Wise. They confronted Wise in his trailer and bound his hands with a telephone cord. Burdine told McCreight they needed something to keep Wise quiet because he would "squeal like a pig in a slaughterhouse." They therefore gagged Wise with the socks and sheet and moved his body to the bedroom.

After gathering up some of Wise's belongings, the men decided something needed to be done to prevent Wise from identifying Burdine. They bound Wise's feet with electrical cord, and Burdine held Wise's legs while McCreight tried to smother Wise with a pillow. Smothering did not work, because Wise thrashed on the bed and finally sat up, whimpering and crying. Burdine then suggested that McCreight hit Wise in the head with a lead-filled police sap. McCreight beat Wise in the head until Wise lay still, bleeding profusely.

The men loaded Wise's belongings into their truck, and then decided something more was needed to silence Wise. They re-entered the trailer and McCreight, after making the sign of the cross, stabbed Wise in the back with a large hunting knife. Burdine then told McCreight "what the hell, hand me the knife," and also stabbed Wise in the back. *See generally Burdine*, 719 S.W.2d, at 312-14; 13SR248-52; *see also* Pet. App. 45a–49a (Barksdale, J., dissenting).

Burdine attempted to recant his confession at trial, but actually corroborated most of its major aspects except his participation in holding down and stabbing Wise. 14SR392-404. Burdine admitted that he and McCreight had planned the crime before going to Wise's trailer, and that robbing Wise was Burdine's idea. 13SR394; 14SR445. Burdine's court-appointed attorney, Joe Cannon, argued strenuously to suppress Burdine's confession, 12SR140-184; 13SR193-96, which was ultimately held to be admissible. *Burdine*, 719 S.W.2d, at 318. Cannon also actively participated in all phases of Burdine's six-day trial. For instance,

Cannon examined numerous witnesses, repeatedly objected to both testimony and photographic evidence, requested and participated in numerous bench conferences, elicited Burdine's testimony on direct and re-direct examination, and presented closing arguments at both the guilt-innocence and punishment phases. *See generally* 12SR43-17SR694; Pet. App. 91a–101a (Barksdale, J., dissenting) (detailing Cannon's participation in the trial). But the jury found Burdine guilty of capital murder and sentenced him to death.

At Burdine's request, Cannon represented him on direct appeal. He raised seventeen points of error, including numerous issues about the admissibility of Burdine's confession. *See Burdine*, 719 S.W.2d, at 312, 317; *see also* Pet. App. 50a–51a & n.12 (Barksdale, J., dissenting). The Texas Court of Criminal Appeals affirmed his conviction and sentence. *Burdine*, 719 S.W.2d, at 309. This Court denied certiorari. *Burdine v. Texas*, 480 U.S. 940 (1987).

Represented by new counsel, Burdine filed his first state habeas petition in 1987, and a supplemental petition in 1988. *See* Pet. App. 52a & nn.13-15 (Barksdale, J., dissenting). A three-day evidentiary hearing was held before a special master, at which Cannon testified about his defense theory and investigation of mitigating evidence. *Id.* In 1990, the special master recommended relief based on the prosecutor's remarks about homosexuality during closing arguments and on Cannon's performance at the penalty phase, but, in 1994, the state habeas court recommended denial. *Ex Parte Burdine*, No. 379,444-A (183d Dist. Ct. Harris Cty., Tex., June 29, 1994); Pet. App. 50a–52a. The court of criminal appeals denied relief. *Ex parte Burdine*, No. 16,725-02 (Tex. Crim. App. Dec. 12, 1994).

Later in December 1994—nearly eleven years after his trial—Burdine filed a second state habeas application alleging for the first time that Cannon had slept or dozed during trial. At the evidentiary hearing in February 1995, Burdine did not testify or

submit an affidavit regarding the sleeping, but testimony was heard from three jurors, the prosecutor, the trial judge, the court clerk, the trial judge's court coordinator, and an attorney who had been Cannon's co-counsel in another capital murder case. *See* Pet. App. 52a–53a (Barksdale, J., dissenting). Although the trial court credited the testimony of the prosecutor and trial judge that they never saw Cannon sleeping, Pet. App. 177c, and noted that one juror never saw Cannon sleep, Pet. App. 179c, the court found from the testimony of three jurors and the court clerk that

> "defense counsel dozed and actually fell asleep during portions of [Burdine's] trial on the merits, in particular during the guilt-innocence phase when the State's solo prosecutor was questioning witnesses and presenting evidence." Pet. App. 175c; *see id.* 3a–5a; *id.* 36a–37a (Barksdale, J., dissenting).

The trial court concluded that prejudice should be presumed under these facts, but the court of criminal appeals disagreed. Although the court of criminal appeals found support in the record for the trial court's fact findings, it concluded that Burdine had not shown prejudice. *Ex parte Burdine*, No. 16,725-06 (Tex. Crim. App. Apr. 6, 1995). This Court again denied certiorari. *Burdine v. Texas*, 515 U.S. 1107 (1995).

Burdine sought federal habeas relief in April 1995, asserting numerous grounds including ineffective-assistance based on Cannon's sleeping. *See* Pet. App. 54a & nn.18-19 (Barksdale, J., dissenting). In September 1999, without conducting a separate evidentiary hearing, the district court granted relief on the sleeping claim. *See Burdine v. Johnson*, 66 F.Supp.2d 854 (S.D.Tex. 1999) (Pet. App. 134b–60b). The court adopted the rule of *Javor v. United States*, 724 F.2d 824, 831 (CA9 1984), that prejudice must be presumed if counsel sleeps through a "substantial portion" of trial. Pet. App. 150b–52b. To determine what a "substantial portion" of trial was, the district court adopted the analysis in

Tippins v. Walker, 77 F.3d 682, 687 (CA2 1996). Pet. App. 151b–54b; *see* Part I, *infra* (discussing tests in *Javor* and *Tippins*).

A divided panel of the Fifth Circuit reversed, holding that (1) the district court's sleeping test may have implicated an additional exception to *Teague v. Lane*, 489 U.S. 288 (1989), created by the Fifth Circuit for claims susceptible of vindication only on habeas review, but (2) nonetheless, the evidence of Cannon's sleeping did not trigger any presumption of prejudice and was amenable to the general prejudice analysis of *Strickland v. Washington*, 466 U.S. 668 (1984). *See Burdine v. Johnson*, 231 F.3d 950, 956-58, 964 (CA5 2000); *see also Jackson v. Johnson*, 217 F.3d 360, 364 (CA5 2000) (creating third *Teague* exception). The en banc court vacated the panel decision, 234 F.3d 1339 (CA5 2000), and affirmed the district court's judgment granting Burdine habeas relief. *See Burdine v. Johnson*, __ F.3d __, 2001 WL 914267 (CA5 Aug. 13, 2001) (en banc) (Pet. App. 1a–133a).

A nine-judge majority held that prejudice must be presumed because the evidence of Cannon's sleeping established that Burdine had been "denied counsel at a critical stage of his trial." Pet. App. 2a (quoting *United States v. Cronic*, 466 U.S. 648, 659 (1984)). The majority also reasoned that Burdine did not seek the benefit of a "new rule" under *Teague*, but sought only a fact-specific application of *Cronic*'s "critical stage" rule. *See* Pet. App. 15a–18a. Finally, the majority articulated a general test that "a defendant's Sixth Amendment right to counsel is violated when that defendant's counsel is repeatedly unconscious through not insubstantial portions of the defendant's capital murder trial." Pet. App. 7a. Four judges concurred, agreeing with the majority opinion but writing separately to clarify their view of *Teague*. *See* Pet. App. 21a–29a (Higginbotham, J., concurring). Five judges dissented in two separate opinions and would have found that (1) the evidence of counsel's sleeping did not trigger a presumption of prejudice under *Cronic*, and (2) any rule imposing such a presumption could not be

retroactively applied under *Teague*. *See* Pet. App. 29a–30a (Jolly, J., dissenting); *id.* 30a–102a (Barksdale, J., dissenting).

On September 12, 2001, the Fifth Circuit stayed its mandate pending this Court's disposition of the Director's certiorari petition. The Director timely petitioned for certiorari review on September 21, 2001. SUP. CT. R. 13(1).

SUMMARY OF ARGUMENT

The Fifth Circuit's decision to presume prejudice under the circumstances of this case implicates three important conflicts among state and federal courts. First, *Burdine* creates a test for analyzing the prejudicial impact of attorney sleeping that conflicts with tests from two other circuits. Three circuits now apply some form of "presumed" prejudice based on three different tests for evaluating attorney sleeping. Second, *Burdine* equates sleeping with physical absence and automatically reverses a conviction based on counsel's temporary absences during the evidentiary portion of trial. That approach accords with some courts, but diverges from others that evaluate such absences under a harmless error analysis. Third, the decision in *Burdine* illogically segregates attorney sleeping from other attorney impairments that have indistinguishable effects on an attorney's ability to function during trial. That decision conflicts with courts that have analyzed such impairments under the traditional prejudice standard.

Burdine therefore implicates this Court's certiorari jurisdiction. It conflicts with decisions of other United States courts of appeals and state courts of last resort, and also decides important questions of federal constitutional law that have not been, but should be, settled by this Court. *See* SUP. CT. R. 10(b), (c).

ARGUMENT

The three conflicts posed by the Fifth Circuit's decision must be understood in light of the Court's familiar framework for analyzing claims of deficient representation. *See Strickland v. Washington*, 466 U.S. 668 (1984); *United States v. Cronic*, 466 U.S. 648 (1984). The Court consistently recognizes that the core purpose of the Sixth Amendment counsel clause is to safeguard the fundamental truth-seeking function of trial and thereby "to ensure that criminal defendants receive a fair trial." *Strickland*, 466 U.S., at 689; *see also Cronic*, 466 U.S., at 656-57 (core Sixth Amendment concern is whether "a true adversarial criminal trial has been conducted"). Thus, ineffective assistance claims generally must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Roe v. Flores-Ortega*, 528 U.S. 470, 482 (2000) (quoting *Strickland*, 466 U.S., at 694).

But the Court has identified narrow circumstances "so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified." *Cronic*, 466 U.S., at 658; *see Smith v. Robbins*, 528 U.S. 259, 287 (2000). First, prejudice is presumed "when a defendant has suffered an '[a]ctual or constructive denial of the assistance of counsel altogether.'" *Smith*, 528 U.S., at 286 (quoting *Strickland*, 466 U.S., at 692, and citing *Cronic*, 466 U.S., at 659 & n.25). Second, the Court has also found that "'various kinds of state interference with counsel's assistance' can warrant a presumption of prejudice." *Smith*, 528 U.S., at 287 (quoting *Strickland*, 466 U.S., at 692, and citing *Cronic*, 466 U.S., at 659 & n.25). Finally, a more limited presumption of prejudice attaches "'when counsel is burdened by an actual conflict of interest,'" provided the defendant shows the conflict adversely affected counsel's performance. *Smith*, 528 U.S., at 287 (quoting *Strickland*, 466 U.S., at 692).

In *Burdine*, the en banc Fifth Circuit concluded that prejudice must be presumed if a defendant's counsel repeatedly sleeps through "not insubstantial" portions of trial, because such deficient performance amounts to an "actual denial" of counsel. *See* Pet. App. 2a, 7a. That decision implicates the following conflicts among state and federal courts.

I. THE SECOND, FIFTH, AND NINTH CIRCUITS HAVE CREATED CONFLICTING TESTS FOR ANALYZING COUNSEL'S LAPSES CAUSED BY SLEEPING.

Three circuits have now adopted tests that, given the same evidence of attorney sleeping, would reach different results as to whether prejudice has been established. These tests conflict because they apply different presumptions—sometimes *per se*, sometimes limited—that are triggered by different evidentiary thresholds. Behind the arbitrary contours of the tests lurks a fundamental misperception about the framework this Court crafted in *Strickland* and *Cronic*. The Court should resolve that quandary and clarify that episodes of sleeping, while reprehensible, are nonetheless amenable to the traditional prejudice test like any other similar attorney impairment.

The Ninth Circuit first addressed attorney sleeping in *Javor v. United States*, 724 F.2d 831 (CA9 1984). Faced with evidence of counsel's repeated sleeping or dozing during the presentation of evidence, the Ninth Circuit refused to determine from the trial record whether such lapses were prejudicial because "unconscious or sleeping counsel is equivalent to no counsel at all." *Id.*, at 834. Instead, the court "conclude[d] that when an attorney for a criminal defendant *sleeps through a substantial portion of the trial* such conduct is inherently prejudicial and thus no separate showing of prejudice is necessary." *Id.*, at 833 (emphasis added). The court did not particularize which episodes of sleeping triggered the presumption, but its opinion, and the evidence before the court, suggest the same result for "dozing" as for complete

unconsciousness. *See id.*, at 832 (magistrate's finding that counsel "was asleep or dozing, and not alert to proceedings"); *id.*, at 833 (noting that trial judge "was at times concerned about [counsel's] inattentiveness"); *id.*, at 834 (referring to "unconscious or sleeping counsel"); *id.* (referring to trial judge's testimony that counsel was "dozing"). Nor did the court quantify what it meant by "substantial portions" of trial, although it referred by way of illustration to periods "while testimony pertaining to the petitioner was being adduced." *Id.*

Twelve years later, the Second Circuit relied on *Javor* to craft its own test to analyze sleeping, but in the process criticized *Javor*'s analysis. *See Tippins v. Walker*, 77 F.3d 682, 685-86 (CA2 1996). The court rejected *Javor*'s focus on the "substantiality" of counsel's sleeping as a reliable indicator of prejudice:

> "The word 'substantial' . . . is unhelpful. It can refer to the length of time counsel slept, or the proportion of the proceedings missed, or the significance of those proceedings. The *Javor* court did not expound on the meaning of the word." *Id.*, at 685.

Tippins therefore morphed the Ninth Circuit's test into a three-part inquiry that asks (1) whether the sleeping constituted "repeated and prolonged lapses," *id.*, at 687-88; (2) whether counsel was "actually unconscious," *id.*, at 688-89; and (3) whether those lapses occurred "when [the defendant's] interests were at stake." *Id.*, at 689-90.

Unlike the Ninth Circuit, *Tippins* did not apply a *per se* presumption of prejudice. Instead, the Second Circuit analogized sleeping to "another, more limited type of presumed prejudice" that *Strickland* reserved for "cases in which counsel is burdened by a conflict of interest." *Id.*, at 686 (citing *Strickland*, 466 U.S., at 692). The court emphasized that it had extended a *per se* rule of prejudice only to cases in which defense counsel was not a member of the bar or had an actual conflict arising from involvement in the

defendant's crime. *Tippins*, 77 F.3d, at 686 (citing *Bellamy v. Cogdell*, 974 F.2d 302, 306 (CA2 1992) (en banc)). Indeed, *Tippins*'s own holding equivocates on whether prejudice was presumed in that case or actually demonstrated. 77 F.3d, at 687 (concluding that Tippins "suffered prejudice, *by presumption or otherwise*") (emphasis added).[2]

In *Burdine*, the Fifth Circuit did not completely embrace either *Javor* or *Tippins*, but rather scavenged parts from both decisions to build a third test. Pet. App. 7a, 18a–19a. The Fifth Circuit will presume prejudice when (1) a "defendant's counsel is repeatedly unconscious" (2) "through not insubstantial portions of the defendant's capital murder trial." *Id.* 7a. *Burdine* applies a *per se* presumption of prejudice—not the more limited presumption of *Tippins*—because the court reasoned that such sleeping episodes amount to the "absence or denial of counsel at a critical stage of a criminal proceeding." *Id.* 12a–13a (citing *Cronic*, 466 U.S., at 659; *Strickland*, 466 U.S., at 692). The court defined the relevant "critical stage" as the period when "evidence was being produced against Burdine," and was thus able to conclude from the non-specific fact findings that counsel had been unconscious, and hence absent, during a critical stage of the proceeding. *See id.* 15a–20a, 2a.

Although these three tests address similar issues—*i.e.*, the depth, length, and timing of sleeping episodes—twenty-five years

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2. Subsequent decisions in the Second Circuit continue to vacillate over whether *Tippins* adopted a *per se* rule of prejudice, or something less. *Compare United States v. O'Neil*, 118 F.3d 65, 70-71 (CA2 1997) (noting that *Tippins* "suggested" that sleeping "may constitute a *per se* violation"); *United States v. Muyet*, 994 F.Supp. 550, 560 (S.D.N.Y. 1998) (stating that *O'Neil* "clarified" that *Tippins* did not create a *per se* rule), *with Morales v. United States*, 143 F.3d 94, 97 (CA2 1998) (suggesting that *Tippins* created a *per se* rule).

of jurisprudential evolution has resolved those issues in conflicting ways. First, the tests require different threshold depths of sleeping—ranging from total unconsciousness, Pet. App. 7a; *Tippins*, 77 F.3d, at 688, to "dozing," *Javor*, 724 F.2d, at 832. Second, they require different lengths of sleeping—through "substantial" trial portions, *Javor*, 724 F.2d, at 833, for "repeated and prolonged lapses," *Tippins*, 77 F.3d, at 687, or, most elusively, through "not insubstantial" trial portions, Pet. App. 7a. Third, they demand that sleeping be localized during trial phases of varying descriptions—periods when "testimony pertaining to" a defendant is adduced, *Javor*, 724 F.2d, at 834, when the defendant's "interests are at stake," *Tippins*, 77 F.3d, at 689, or when "evidence is being produced against" a defendant, Pet. App. 18a. Finally, the tests apply different presumptions of prejudice—either a *per se* presumption based on a "critical stage" concept, Pet. App. 2a; *Javor*, 724 F.2d, at 833, or a limited presumption related to the "actual conflict of interest" rationale, *Tippins*, 77 F.3d, at 686. The tests have this rough-hewn quality because they are judicial answers to a question—when is attorney sleeping so likely to undermine a trial outcome that prejudice must be presumed?—that has infinite degrees of variation.

The differences in the tests are not mere semantics. As for depth of sleep, common experience plainly shows that "consciousness and sleep form a continuum, and that there are states of drowsiness that come over everyone from time to time during a working day, or during a trial." *Tippins*, 77 F.3d, at 689. Consequently, there is a fundamental practical difference between presuming prejudice for extended periods of unconsciousness and presuming it for drowsiness, inattention, or even momentary sleep. As for length of sleep, the Fifth and Ninth Circuits have adopted similar measures—"substantial" or "not insubstantial" trial periods—that the Second Circuit has condemned as vague and "unhelpful." *Compare* Pet. App. 7a *and Javor*, 724 F.2d, at 833, *with Tippins*, 77 F.3d, at 685. Arguably, however, the Second

Circuit's solution—requiring sleep for "repeated and prolonged lapses"—raises similar difficulties. *See Tippins*, 77 F.3d, at 687. As for timing of sleep, the three tests each set standards so vague that they fail to reliably specify any particular part of trial. Presumably, *all* evidence at trial "pertains to" a defendant, *Javor*, 724 F.2d, at 834, and all of the prosecution's evidence is "against" him, Pet. App. 18a. Moreover, it is self-evident that the defendant's "interests are at stake" during each and every moment of the trial (and pre-trial and post-trial) process. *Tippins*, 77 F.3d, at 689. Not only do these labels provide no guidance to a court seeking to discern precisely *when* sleeping must occur before prejudice is presumed, but they will result in a presumption of prejudice "irrespective of . . . whether counsel could have done anything to improve the defendant's circumstances had he been alert." Pet. App. 78a (Barksdale, J., dissenting).

At bottom, these tests represent a flawed application of the *Strickland-Cronic* categories of presumed-prejudice to a class of trial error for which they are ill-suited: intermittent, isolated lapses in an attorney's trial performance. *See Smith*, 528 U.S., at 286-87; *Strickland*, 466 U.S., at 693. Federal courts have now made three attempts to fashion a blanket rule to account for an attorney error with a broad range of possible effects on the trial, and, unsurprisingly, the result is inconsistency. The Court should resolve this conflict.

II. STATE AND FEDERAL COURTS CONFLICT OVER WHETHER COUNSEL'S TEMPORARY ABSENCES FROM TRIAL ARE AUTOMATICALLY REVERSIBLE OR SUBJECT TO HARMLESS ERROR ANALYSIS.

Burdine's holding is bottomed on the court's equation of counsel's sleeping with temporary absence from trial. Pet. App. 7a, 20a. *Burdine* therefore implicates an additional conflict with state and federal courts over the treatment of such temporary absences.

Some courts, like the Sixth Circuit and the South Carolina Supreme Court, agree with the Fifth Circuit and find reversible error from any temporary absence of counsel during the evidentiary portion of trial. *See, e.g., Green v. Arn*, 809 F.2d 1257, 1263 (CA6), *vacated on other grounds*, 484 U.S. 806 (1987), *reinstated*, 839 F.2d 300 (CA6 1988); *McKnight v. State*, 465 S.E.2d 352, 354 (S.C. 1995). Other courts, like the Seventh Circuit, the Eleventh Circuit, and a New Jersey intermediate appellate court, disagree and analyze such temporary absences under a harmless error analysis. *See, e.g., Vines v. United States*, 28 F.3d 1123, 1128 (CA11 1994); *United States v. Morrison*, 946 F.2d 484, 503 (CA7 1991); *State v. Scherzer*, 694 A.2d 196, 237-40 (N.J. Super.), *cert. denied*, 700 A.2d 878 (N.J. 1997). This divergence goes to the heart of a sleeping counsel's perceived impact on a criminal trial—*i.e.*, whether intermittent sleeping will result in a new trial without any weighing of the harm caused by sleeping episodes within the context of the entire record.

As the New Jersey appellate court explained in *Scherzer*, the courts actually diverge on two distinct issues. First, courts disagree over whether the entire evidentiary portion of trial constitutes a "critical stage" under *Cronic*. *See Scherzer*, 694 A.2d, at 237. The Sixth Circuit maintains that "the evidentiary portion of the trial [is] always critical." *Id.* (citing *Green*, 809 F.2d, at 1263); *see also Carter v. Sowders*, 5 F.3d 975, 979 (CA6 1993) (confirming *Green*'s rule that the "taking of evidence on the defendant's guilt" is always a critical stage). By contrast, the Seventh and Eleventh Circuits do not presumptively consider all evidentiary portions of trial as critical without first scrutinizing any particular portion in the context of the entire record. *See Scherzer*, 694 A.2d, at 237 (citing *Vines*, 28 F.3d, at 1128; *Morrison*, 946 F.2d, at 503). Second, the same courts disagree over whether counsel's temporary absence from even critical evidentiary portions of trial is amenable to harmless error analysis. *See Scherzer*, 694 A.2d, at 239-40. The Sixth Circuit rejects applying harmless error analysis, *Green*, 809

F.2d, at 1263, while the Seventh and Eleventh Circuits inquire whether "the temporary absence of defense counsel during a portion of the actual trial did not affect the conduct of the entire trial." *Scherzer*, 694 A.2d, at 240 (interpreting *Morrison*, 946 F.2d, at 503, and *Vines*, 28 F.3d, at 1129). The South Carolina Supreme Court follows the Sixth Circuit's *per se* approach, *McKnight*, 465 S.E.2d, at 353-54, while the New Jersey appellate court accepts the contrary view that "a temporary absence of counsel is not such a defect as to prevent a court from pursuing the issue of harmless error." *Scherzer*, 694 A.2d, at 240 (citing *Vines*, 28 F.3d, at 1129).

Burdine squarely places the Fifth Circuit on one side of this conflict and strengthens the disagreement. First, agreeing with the Sixth Circuit and the South Carolina Supreme Court, *Burdine* treats every segment of the evidentiary phase of trial as critical, regardless of the context of a particular portion within the overall record. *See, e.g.*, Pet. App. 2a (finding that intermittent sleeping occurred "as evidence was being introduced against [Burdine]"), 5a (state court finding that counsel dozed or slept "during portions of [Burdine's] trial on the merits, in particular the guilt-innocence phase when the State's solo prosecutor was questioning witnesses and presenting evidence"), 18a (observing that sleeping episodes were interspersed "throughout the guilt-innocence phase of Burdine's trial as evidence was being produced against Burdine"); *cf. Scherzer*, 694 A.2d, at 237 (observing that, in contrast to Seventh and Eleventh Circuits, Sixth Circuit holds that "the evidentiary portion of the trial was always critical"). Indeed, as Judge Barksdale's dissent explained, the majority effectively overruled a prior panel decision, *Russell*, that had refused to hold that the evidentiary phases of trial are always critical. *See* Pet. App. 77a–79a (Barksdale, J., dissenting) (stating that "the majority has overruled *Russell* and established a new rule"); *see United States v. Russell*, 205 F.3d 768, 769-71 (CA5 2000).

Second, *Burdine* equated sleeping with physical absence, and held that counsel's sleeping during any evidentiary portion of trial will always result in automatic reversal and a new trial. Pet. App. 2a, 20a. That is so, reasoned the majority, because under such circumstances the defendant has been "'denied counsel at a critical stage of his trial.'" *Id.* 2a (quoting *Cronic*, 466 U.S., at 659). That holding accords with the *per se* rule adopted by the Sixth Circuit and the South Carolina Supreme Court, *see Scherzer*, 694 A.2d, at 240, and contradicts the approach of other courts that would measure temporary attorney absences against the entire trial record, determine whether they occurred at critical junctures, and, even then, ask whether they were harmless beyond a reasonable doubt. *See, e.g., Morrison*, 946 F.2d, at 503-04.

The Fifth Circuit's decision to apply an automatic reversal rule—as opposed to a more balanced rule, such as *Strickland* or harmless error analysis—sealed the outcome of this case. Had the majority measured the evidence of counsel's sleeping against the entire trial record, it would have found no reason to reflexively overturn the jury's verdict. It was uncontested that evidence of sleeping could not be linked to any particular part of the trial. *See, e.g.*, Pet. App. 36a–37a (Barksdale, J., dissenting) (explaining state fact findings regarding sleeping). Thus, it is doubtful that Burdine could show that any sleeping occurred during a critical juncture of his trial. *See id.* 77a–78a (Barksdale, J., dissenting); *see also id.* 29a (Jolly, J., dissenting) (stating there is "no suggestion in the record that Burdine suffered any prejudice on account of counsel's alleged sleeping" and "no evidence in the record that shows that counsel's sleeping occurred at a critical stage in the trial").

Furthermore, the record plainly shows that "Burdine's counsel actually provided competent representation throughout the trial." *Id.* 29a (Jolly, J., dissenting); *see also id.* 91a–100a (Barksdale, J., dissenting) (detailed narrative of defense counsel's active participation in Burdine's defense). The trial transcript reveals

"very few long stretches . . . in which no activity by [counsel] is reflected," and those inactive periods typically correspond to the introduction of demonstrative evidence on which the court had previously overruled counsel's objections. *See id.* 99a (Barksdale, J., dissenting) (discussing introduction of crime scene and property photographs). Finally, counsel vigorously contested the admissibility of the most damning evidence against Burdine—his detailed confession to the murder—unsuccessfully arguing at trial and on appeal that the confession had been coerced. *See id.* 100a–01a (Barksdale, J., dissenting).

Measured against the overall record in this case, the sparse evidence of counsel's sleeping would not have merited automatic reversal under the more tempered rules of the Seventh and Eleventh Circuits. *See Vines*, 28 F.3d, at 1128; *Morrison*, 946 F.2d, at 503; *see generally Scherzer*, 694 A.2d, at 237-41. Moreover, if measured by this Court's general prejudice standard for deficient attorney performance—as it should have been—Burdine could not have demonstrated a reasonable probability that, absent counsel's sleeping episodes, the outcome of his trial would have been different. *See Strickland*, 466 U.S., at 693-94.

The Court should resolve this conflict among state and federal courts and determine whether defense counsel's temporary absences during trial merit a presumption of prejudice, whether they are amenable to harmless error analysis, or whether they should be governed by the general prejudice standard of *Strickland*.

III. INTERMITTENT SLEEPING IS INDISTINGUISHABLE FROM OTHER ATTORNEY IMPAIRMENTS ANALYZED UNDER THE TRADITIONAL PREJUDICE STANDARD.

Finally, a core aspect of *Burdine* inviting certiorari review is the Fifth Circuit's decision to set aside one kind of attorney-impairment for a presumption of prejudice. The Court distinguished "the drunk or drugged attorney" from the sleeping

lawyer because the sleeping lawyer "does not, indeed cannot, perform at all," and "is simply not capable of exercising judgment." Pet. App. 19a–20a. But that elevation of sleeping is, as Judge Barksdale's dissent argues, in tension with other courts' treatment of similar attorney-impairments. *See id.* 90a–91a (Barksdale, J., dissenting). Furthermore, it overlooks that even instances of "repeated unconsciousness" have much in common with similar episodes of mental impairment—whether due to illness, drug- or alcohol-based incapacity, or inattention—that have consistently been treated under the traditional prejudice standard. Thus, reserving a presumption of prejudice for sleeping episodes alone presents a conflict the Court should resolve.

A representative conflicting decision is *Johnson v. Norris*, 207 F.3d 515 (CA8 2000). In *Norris*, the court addressed the petitioner's ineffective-assistance claim based on his attorney's "unprofessional . . . perhaps bizarre" conduct during and after trial, stemming from a bipolar disorder. *Id.*, at 517. The court rejected the petitioner's reliance on *Javor* and *Tippins* and held that "[e]ven if we assume that [counsel's] bipolar condition existed during the petitioner's trial, we decline to adopt the petitioner's proposed rule." *Id.*, at 518. Reaffirming its decision to reject a *per se* presumption of prejudice for counsel's mental illness, the court reasoned that "[b]ipolar disorder, like most mental illnesses, can have varying effects on an individual's ability to function, and the disease can vary widely in the degree of its severity." *Id.* (citing *Pilchak v. Camper*, 935 F.2d 145, 149 (CA8 1991)). Thus, the court applied the traditional prejudice analysis, confident that "[a]ny errors [counsel] made, even as a result of his mental illness, should be apparent from the face of the record, or otherwise susceptible of proof, and thus readily reviewable." *Norris*, 207 F.3d, at 518.

The Eighth Circuit's approach in *Norris* conflicts with *Burdine* because sleeping counsel—even if characterized as "repeatedly

unconscious" counsel—is not so different from mentally impaired counsel to warrant an entirely different prejudice analysis. *See also Pilchak*, 935 F.2d, at 147-48 (evaluating counsel's impaired trial performance under prejudice standard, although counsel suffered from Alzheimer's disease, "prompt[ing] disorientation, loss of memory, [and] inability to concentrate"); *Smith v. Ylst*, 826 F.2d 872, 875-76 (CA9 1987) (applying traditional prejudice analysis to evaluate "mentally unstable" counsel's performance during trial, distinguishing *Javor*); *Hernandez v. Wainwright*, 634 F.Supp. 241, 245 (S.D. Fla. 1986) (evaluating under prejudice analysis counsel's alcohol-impaired performance during trial and pre-trial stages), *aff'd*, 813 F.2d 409 (CA11 1987).[3] It is doubtful that there is any qualitative difference between repeated sleeping and other attorney-impairments, insofar as they effect an attorney's ability to function mentally during trial. Consequently, these decisions present a conflict with *Burdine* that the Court should resolve.

The Fifth Circuit draws an arbitrary distinction between an attorney who intermittently sleeps during trial and an attorney impaired during trial by intoxicants, addiction, or illness. The court reasoned that the unconscious attorney "does not, indeed cannot perform, at all," that he "is simply not capable of exercising judgment," and "is in fact no different from an attorney that is physically absent from trial since both are equally unable to exercise judgment on behalf of their clients." Pet. App. 19a–20a.

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3. Indeed, this entire line of cases contradicts *Javor* itself. In formulating its *per se* rule, the *Javor* court relied on *State v. Keller*, 223 N.W. 698 (N.D. 1929), in which counsel was "intoxicated to such an extent that he did not know what was transpiring at all times in the court room." *Javor*, 724 F.2d, at 834. Thus, *Javor* derived its *per se* rule at least in part by analogy to a case involving an attorney impaired by alcohol during trial. By contrast, courts that apply a prejudice analysis to exactly that kind of impaired performance implicitly reject *Javor*'s main premise.

But precisely the same thing could be said of attorneys suffering during trial from Alzheimer's disease, *see Pilchak*, 935 F.2d, at 147-48; *Buckelew v. United States*, 575 F.2d 515, 521 (CA5 1978); from intoxication or drug addiction, *see Burnett v. Collins*, 982 F.2d 922, 928-30 (CA5 1993); *Hernandez*, 634 F.Supp., at 245; or from any number of mental disorders, *see Norris*, 207 F.3d, at 518; *Ylst*, 826 F.2d, at 875-76. It cannot be reasonably claimed that an attorney suffering the symptoms of mental illness or the effects of addiction is "capable of exercising judgment" at all times during trial. Moreover, what unifies these examples with *Burdine* is that all involve an attorney's impaired trial performance whose prejudicial impact can be evaluated in light of the entire trial record. *See, e.g., Strickland*, 466 U.S., at 693 (aside from actual conflict of interest, "deficienc[ies] in attorney performance" are subject to general prejudice requirement). The *Burdine* majority offered no logical basis for carving "intermittent attorney sleeping" from the class of all possible attorney-impairments and elevating it to presumed-prejudice status. *See* Pet. App. 90a–91a (Barksdale, J., dissenting).

That elevation will invite countless ineffective-assistance claims based on any type of intermittent "unconsciousness" by counsel during trial. "Unconscious," after all, is a malleable term—it may refer to "not knowing or perceiving," "not aware," "not marked by conscious thought," or "having lost consciousness." WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY, at 1284-85 (1988). In *Burdine*'s wake, imaginative habeas petitioners will parade expert witnesses into their writ hearings to testify that—given trial counsel's subsequently-diagnosed Alzheimer's, or bipolar condition, or alcoholism, or attention-deficit disorder—it is likely that periods of "unconsciousness" occurred during trial, and therefore prejudice should be presumed. The argument has been made before, *see, e.g., Norris*, 207 F.3d, at 518, and *Burdine* will give it new life.

The Court should close this arbitrary breach in the law and clarify that *Strickland* meant what it said: An actual conflict of interest is the only instance of deficient attorney performance that merits a presumption of prejudice. *See* 466 U.S., at 693. Intermittent episodes of attorney sleeping are indistinguishable from other kinds of impaired attorney performance that, while lamentable, "are subject to a general requirement that the defendant affirmatively prove prejudice." *Id.*

CONCLUSION

The Fifth Circuit's decision in this case implicates three important issues of Sixth Amendment law on which courts sharply disagree. The Court should grant the Director's petition.

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